***United States Court of Appeals***

***for the Second Circuit***


# AMICUS BRIEF

# 76-1194

## United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1194

UNITED STATES OF AMERICA,
*Plaintiff-Appellee,*

—v.—

PHILIP ROSTELLI, *et al.*,
*Defendants,*

JOHN JOSEPH SUTTER, ESQ.,
*Defendant-Appellant.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

## BRIEF ON BEHALF OF THE BAR ASSOCIATION OF NASSAU COUNTY, NEW YORK, INC.

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## BRIEF ON BEHALF OF THE BAR ASSOCIATION OF NASSAU COUNTY, NEW YORK, INC.

### Statement of Interest

The Bar Association of Nassau County, New York, Inc. has a membership of over 3,100 attorneys practicing primarily in Nassau County. Because the issues raised by the proceedings below resulting in the imposition of a $1,500 as "costs" upon appellant, are relevant to practitioners who not infrequently find themselves torn between conflicts of State and Federal Court schedules; and because of the desirability of avoiding the imposition of "costs" as punishment upon attorneys except in the most extraordinary situations, the Board of Directors of the Nassau County Bar Association authorized the appointment of counsel to file an *amicus curiae* brief on this appeal.*

* The government and appellant have consented to the filing of this *amicus curiae* brief.

The Association supports the position of appellant because, the record of appellant's conduct, both legally and factually, does not warrant the imposition of a $1,500 fine as "costs". The evidence is insufficient to conclude that appellant acted out of a deliberate or reckless disregard of his professional obligation to the Court, or that he had intended any disrespect for the Court. This is the element necessary for the Court to hold an attorney in contempt of Court, and should be no different for the imposition of "costs" as a sanction upon an attorney.

## Question Presented

Whether a Court can impose upon an attorney financial punishment in the form of $1,500 "costs" for an alleged delay of trial, in the absence of any evidence or finding that the attorney's conduct constituted a deliberate or reckless disregard of his professional obligations to the Court, or that he had intended any disrespect for the Court?

## Statutes Involved

Title 18, United States Code, Section 401, provided that "A Court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as—

(1) misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;

(2) misbehavior of any of its officers in their official transactions;

(3) disobedience or resistance to its lawful writ, process, order, rule, decree, or command."

## Rules Involved

Rule 42 (b) of the Federal Rules of Criminal Procedure provides as follows:

> "(b) DISPOSITION UPON NOTICE AND HEARING. A criminal contempt except as provided in subdivision (a) of this rule shall be prosecuted on notice. The notice shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the essential facts constituting the criminal contempt charged and describe it as such. The notice shall be given orally by the judge in open court in the presence of the defendant or, on application of the United States attorney or of an attorney appointed by the court for that purpose, by an order to show cause or an order of arrest. The defendant is entitled to a trial by jury in any case in which an act of Congress so provides. He is entitled to admission to bail as provided in these rules. If the contempt charged involves disrespect to or criticism of a judge, that judge is disqualified from presiding at the trial or hearing except with the defendant's consent. Upon a verdict or finding of guilt the court shall enter an order fixing the punishment."

Rule 8 of the Individual Assignment and Calendar Rules of the United States District Court for the Eastern District of New York provides:

> "(a) Dismissal or Default. Failure of counsel for any party to appear before the court at a conference, or to complete the necessary preparations, or to be prepared to proceed to trial at the time set may be considered an abandonment of the case or failure to prosecute or defend diligently, and an appropriate order may be entered against

the defaulting party either with respect to a specific issue or on the entire case.

(b) Imposition of Costs on Attorneys. If counsel fails to comply with Rules 3(f), 6(f) or 9 or a judge finds that the sanctions in subdivision (a) are either inadequate or unjust to the parties, he may assess reasonable costs directly against counsel whose action has obstructed the effective administration of the court's business."

Rule 9 of the Criminal Rules of the United States District Court for the Eastern District of New York provides:

"9. Responsibility of the United States Attorney and Defense Counsel.

(a) The court has sole responsibility for setting and calling cases for trial. Neither a conflict in schedules of Assistant United States Attorneys nor a conflict in schedules of defense counsel will be ground for a continuance or delayed setting except under unusual circumstances approved by the court and called to the court's attention at the earliest practicable time. Each judge will schedule criminal trials at such times as may be necessary to assure prompt disposition of criminal cases. The United States Attorney will familiarize himself with scheduling procedures of each judge and will assign or reassign cases in such manner that the government will be able to announce ready for trial.

## Statement of the Case

This controversy arises out of the fact that appellant had been unable to commence a criminal trial (*United States* v. *Philip Rostelli, et al.*) before the Honorable Thomas C. Platt, United States District Judge for the Eastern District of New York, because he had been ac-

tually engaged in an attempted murder trial before the Nassau County Court (*People* v. *Gregory Charmont*) on March 29, 1976. Appellant's inability to commence the Rostelli trial on March 29, 1976 resulted in the imposition of $1,500 "costs" by Judge Platt. The basis for the imposition of the "costs" is contained in Judge Platt's memorandum-order which states, in pertinent part:

> ....since Mr. Sutter's conduct herein has caused a complete disruption of this Court's calendar, has caused the unnecessary adjournment of other cases both before the undersigned and other Judges, has inconvenienced the co-defendants and their counsel, and has required the unnecessary conventions of a jury panel for this case, this Court feels that it has no alternative but to impose costs for each day of delay of the trial in this case caused by such conduct. Accordingly the Court imposes on Mr. Sutter costs of $500 a day for each day of delay, i.e., Monday, Tuesday and Wednesday, March 29-31 or a total of $1,500 payable to this Court.

Although the memorandum-order does not specifically recite that the costs were imposed as punishment for contempt, the record shows that the Judge intended, and appellant understood, that a fine was to be imposed as punishment to vindicate the authority of the Court in the enforcement of a directive for the commencement of a trial (92a). To understand the circumstances under which appellant found himself actually engaged in an attempted murder trial, at a time when he was scheduled to commence the Rostelli trial, it is necessary to briefly review the proceedings which lead to this conflict between Court schedules.

Appellant was the attorney for one of the four defendants in the Rostelli case. He represented Philip Rostelli. The indictment charged the four defendants with alleged violations of 18 U.S.C. § 1951, 1961, 1962(c) and 15

U.S.C. § 1; and had been returned on March 5, 1975. The trial of the case had been adjourned several times thereafter; and on January 5, 1976, the trial was further adjourned * but ultimately set down for March 29, 1976. All counsel, including appellant, were issued Certificates of Engagement by Judge Platt for March 29, 1976.

Sometime in the latter part of February 1976, appellant was retained by Gregory Charmont, a defendant charged with attempted murder of a police officer, in a case pending before the Nassau County Court. This was an unusual situation. Charmont's family sought appellant's services, only after his retained counsel became "unavailable" for some reason not clear in the record. (46a-47a, 102a).

Judge Alfred F. Samenga, Nassau County Court Judge, ordered that the Charmont trial commence on March 8, 1976. The order was evidently brought about because the prosecution's principal witness suffered from a very serious cancerous condition making his "appearance and ability" to testify in Court exceedingly tenuous. (93a). Both the Judge and the prosecutor estimated that the Charmont trial would require no more than two weeks, particularly in view of the fact that it would be tried without a jury. Appellant made no reference whatsoever to the March 29, 1976 certificate of engagement in the Rostelli case, in view of the prosecutor's two-week estimate for the trial (115a).

The Charmont trial was commenced on March 8, 1976. As the trial progressed, however, it soon became apparent that the expectations of the Court and prosecutor would not be realized, and that appellant would find himself unable to commence the Rostelli trial on March 29, 1976.

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* The District Judge attributed this adjournment solely to the request of appellant (147a). The record shows, however, that the Government, on January 2, 1976, had requested an adjournment until March 1st because its key witness was recovering from surgery (65a).

Appellant did not ignore his professional obligations. Through his associate, Stephen Willson, Esq., appellant notified the federal prosecutor handling the Rostelli case of the approaching conflict for March 29, 1976. This occurred sometime before March 19, 1976. The prosecutor assured Mr. Willson that he would notify the Court of appellant's problem, which he promptly did. (105a-106a, 116a-117a). Appellant also advised his client, the defendant Philip Rostelli, of the approaching problem, and Rostelli began consulting the law firm of Saxe, Bacon & Bolan P.C. to undertake his defense at trial (103a).

Judge Platt, upon learning of appellant's approaching conflict, called a pre-trial conference.* On March 19, 1976 counsel for all defendants appeared. Stephen Willson appeared for appellant; and Michael Rosen appeared for the Saxe, Bacon & Bolan law firm. Both Willson and Rosen requested that Judge Platt permit the Saxe firm to be substituted for appellant. Rosen, however, requested a 30-day adjournment of the trial date to allow for preparation. (90-16a).

Judge Platt refused to grant the substitution of counsel unless the Saxe firm agreed to commence the trial on March 29, 1976 (18a):

> The Court: I am not going to make any changes. Every other case in this court at the moment has been inconvenienced as far as I understand by this case. It is going ahead. I have relayed to all of the judges that this was a date requested by the defendants, and it was a date firmly fixed several months ago, and I have moved my calendar around, and moved all sorts of other litigants around. If you don't believe that is so,

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* This was apparently the result of a communication from the prosecutor who stated that he had assured Mr. Willson that he would notify the Court of appellant's problem (116a-117a).

> you can ask any of the other people that have appeared in the last few weeks. All have been told that the time for March 29th has been reserved for this case because of this gentleman. This is the date you picked. I am not going to set the world aside for Mr. Rastelli or anybody else. That ends that.

A second pre-trial conference was held on March 24, 1976, apparently at the request of the Government. Roy Cohn, Esq. appeared for the Saxe firm. The prosecutor informed Judge Platt that the Government had given further consideration to the application of Philip Rostelli for an adjournment and substitution of counsel. The Government joined in an application for a one-week adjournment of the trial date. The Government's application was based upon the fact that the anticipated six-week trial was to be substantially shortened by one-third, as a result of a severance of co-defendant Louis Rostelli; and for the further reason that there appeared to be some question concerning the adequacy of appellant's preparation for the trial. (39a-40a)

The Government's application was summarily rejected by Judge Platt (40a-42a):

> The Court: The government has no say in this matter. The court is not going to grant any adjournment. Mr. Philip Rastelli has had in my book one of the best law firms in Suffolk County. Mr. Sutter is a well-known, and as I understand it, a very competent attorney. I don't for one minute for one minute believe that Mr. Sutter is not capable of trying this case. Mr. Philip Rostelli, at this point of the game, wishes to substitute counsel, and he does so. If counsel wishes to undertake a representation of this case after its present posture for a year and a couple of months, they

> do so at this count. There is no danger that I see in this. There was a date set by the parties and their counsel. The trial was set, and everybody said they would be ready. And I have moved everything around in this court, and in several other courts, to have this space available starting March 29th for this trial and I am not going to change. The judges in this court have a very busy schedule. In this case it is not fair. Just because Mr. Rostelli at this point wants to change his mind and get another counsel. I make my position abundantly clear. You can mandamus me to the Court of Appeals, and if they say under these circumstances that I must grant a week's adjournment, then it is on their bounds to foul up my calendar, and every other calendar in this court for the rest of the Spring, and if they want to interfere with the District Court's calendar, God bless them.

Mr. Cohn sought to persuade the Judge that the requested adjournment was a reasonable one, particularly in view of the substantial shortening of the trial time and the willingness of his firm to undertake the trial. Judge Platt, however, refused this joint request (42a-43a):

> The answer is no, and I direct you to order this record and to take it to the Court of Appeals if they mandamus me.

At the close of the proceedings Mr. Cohn expressed his dismay at the Judge's intrasigent position, in the face of efforts by counsel for both the Government and the defense, to resolve the Court's problem (45a):

> We would all solve this by a one week adjournment in which a new counsel could come in without being delayed. If this rents a seam in your Honor's

plans, I am afraid we have all tried so hard to do something that is going to solve the problem.

The Court: I said all I am going to say.

Mr. Cohn: Thank you, Your Honor.

A petition for mandamus was immediately prepared and filed March 26, 1976 by the Saxe firm for a stay of the March 29, 1976 trial date in order to allow for a one-week adjournment for trial preparation.

On Friday, March 26, 1976, appellant prepared and filed with Judge Platt, an affidavit explaining the circumstances under which he had been retained in the Charmont case, and requested that the Rostelli trial be adjourned for four weeks (46a). The Judge read the affidavit and telephoned Judge Samenga, who advised Judge Platt that appellant had not made the Court aware of his March 29 engagement. Judge Samenga told Judge Platt that had appellant advised the Court of the March 29 trial date, it would have been "honored". But Judge Samenga would not release appellant from the Charmont trial to try the Rostelli case. When asked what had been the original estimate for the length of the Charmont trial, Judge Samenga confirmed that it had been expected to last two-weeks (56a-57a, 71a, 115a).

On Monday, March 29, 1976 the Rostelli case was called before Judge Platt. Mr. Willson appeared for appellant; and John Lang, Esq. appeared for the Saxe law firm. After chastizing Mr. Lang for filing the mandamus petition without having obtained a formal substitution as counsel for Philip Rostelli, Judge Platt addressed himself to appellant's problem. The Judge disclosed his conversation with Judge Samenga, and advised Mr. Willson that appellant's March 26 application for

an adjournment would not be granted. The Judge then advised Mr. Willson that (57a):

> In fairness, you are going to have to try the case . . . I say I think you are going to have to try the case.

This brought an immediate protest from both Mr. Willson, and the defendant Philip Rostelli, who stated: "I didn't retain Mr. Willson". Judge Platt countered: "You retained a firm".

The Judge then sought to force Mr. Willson to trial under threat of fining appellant (57a-58a).

> The only alternative you leave me, Mr. Willson, is to fine Mr. Sutter . . . If you want to fine Mr. Sutter as a result of his (conduct), I will. The other alternative is for you to go to trial.

Judge Platt granted a short recess to allow Mr. Willson an opportunity to contact appellant concerning the Judge's threatened action. Following the recess, Mr. Willson reported that attempts to contact appellant, who was on trial, were unsuccessful. Judge Platt's attitude remained the same: "I am here. He can come in at any time. As far as I can see, I assume you are just going to refuse to go ahead." (61a).

The Judge made one further attempt to force Mr. Willson to trial. The Judge reviewed the notice of appearance to ascertain whether it had been filed in the firm's name, or appellant's name. The notice, however, was not filed by appellant in his firm's name. (61a).

The Judge continued the proceeding by attacking counsel concerning the mandamus petition. The Judge viewed the facts recited on the petition as "completely at variance" with the history of the case, and "that's the reason why this Court wants to go to trial today". (61a-65a).

At this point in the proceedings, Judge Platt learned that the Court of Appeals had denied the mandamus petition, but had nonetheless suggested that the Judge reconsider the application for an adjournment. Judge Platt's reaction was evidenced by his immediate accusation levelled against the Saxe firm which had filed the mandamus petition. The Judge accused the firm of having misrepresented facts to the Court of Appeals, and pointed to one statement contained in the petition. Judge Platt called the statement "misleading" and "'wholly reprehensible" (65a-66a).

With respect to an adjournment of the trial date, Judge Platt announced (66a):

> As far as I am concerned, the case is ready, and as far as I am concerned, Mr. Sutter is. If his firm is not prepared to try it, he is going to have to pay the consequences. I can't force Mr. Willson on trial, unfortunately, because he pointed out he did not file a firm notice of appearance. But all I can do is fine Mr. Sutter. So I will impose a contingent fine of $1,000 on Mr. Sutter for his failure to appear in accordance with the mandate of this Court.
>
> I will give him an opportunity to address this Court and be heard on the subject, and I will call the case on a day-by-day basis with all other attorneys being deemed engaged until Mr. Sutter is free.

Because the commencement of the trial still remained uncertain, counsel for both the Government and co-defendants sought to persuade the Judge to fix a realistic trial date. Counsel for the Saxe firm suggested that jury selection commence three days later on Thursday with opening statements, and that testimony begin on the following Monday. But Judge Platt rejected this suggestion out of hand, and directed that counsel await of appellant's appearance before the Court (73a). Counsel from the Saxe firm requested that he, too, be notified of appellant's

appearance. This request was met by the following remarks of Judge Platt (86a):

> THE COURT: I don't know. I don't really want to recognize your appearance until you have filed a notice of appearance. I don't want to be charged with anything dealing with your office until you have properly appeared in this case. As I indicated to you at the start of this proceeding, I think it was improper for you to do what you did. To go to the Court of Appeals not as attorneys in this case and make an application. Counsel, you are pressing your luck pretty far. I don't feel that I can do anything with respect to you, because frankly, I don't recognize your existence here in this case.
>
> If I had been sitting on the Court of Appeals and you had pulled something like this on me, I think you know what I would have done with you based on what I said. I don't know how to make it clearer to you. I don't think it is proper for an attorney who is not retained to make an application of the type that you made and not tell the Court of Appeals that you are not an attorney of record.

The following morning, March 30, 1976 appellant appeared before Judge Platt, with the permission of Judge Samenga. Appellant was accompanied by his law partner, James Moffatt, who requested an opportunity "to hopefully demonstrate to this Court most respectfully that Mr. Sutter did not intentionally or wilfully violate a directive or mandate of this Court of any provision of Section (4)01 Title 18, United States Code". There followed a lengthy colloquy, between the Judge, appellant and Mr. Moffatt. (90a-94a).

A review of this colloquy shows that Judge Platt viewed appellant's failure to call the certificate of engage-

ment to Judge Samenga's attention on March 8, 1976 as the paramount cause of the delay in commencing the Rostelli trial. The Judge stated that his failure to do so was inexcusable. Appellant, and his partner, explained that since both Judge Samenga and the prosecutor estimated the non-jury trial would last no more than two weeks, it was appellant's judgment that there was no necessity to discuss the certificate of engagement. (95a)

Appellant respectfully and sincerely apologized to Judge Platt for the inconvenience caused by the conflicting engagements. Appellants stated in no uncertain terms that (104a-105a):

> I never intended to affront this Court. I never intended to shirk my responsibility. It is an unfortunate situation and I accept the responsibility and I ask your Honor at this point to adjourn this particular case until Thursday when new counsel will come in. They are here and they are prepared to be substituted and Mr. Rostelli desires that substitution, Mr. Philip Rosteili.

After appellant concluded his explanation, and apologies, Judge Platt remained on the bench and began to read his decisions from a rough draft already prepared before the proceedings had begun. The Judge imposed a "fine" of $1,500 upon appellant, calculated at $500 for each day delay of the trial. Later, the Courts final memorandum-order was changed to read that the Court had imposed "costs" of $1,500 upon appellant.

Appellant returned to Judge Samenga's Court in Nassau County that afternoon to continue the Charmont trial, and later paid the $1,500 fine. The Rostelli trial began on Thursday, April 1, 1976, and was concluded on April 23, 1976. Philip Rostelli was represented by the Saxe firm throughout the trial. The jury found Rostelli guilty on all counts contained in the indictment.

## ARGUMENT

It is respectfully submitted that before an attorney may be subjected to the sanction of financial punishment as "costs" for an alleged delay of trial, the Court must find that the attorney's conduct constituted a "willful" disregard or disobedience of the Court's directive. The Court must find that the attorney deliberately or recklessly disregarded his obligation to the Court, or that he had intended any disrespect for the Court. This is the standard that must be met for an attorney to be found guilty of contempt of Court, and should be no different for the imposition of "costs". See: *Sykes* v. *United States*, 444 F.2d 928 (D.C. Cir. 1971).

In the appellant's case the record shows that the District Judge was unable to make such a finding in light of the undisputed fact that the Nassau County trial had not been expected to conflict with the Federal engagement. The memorandum-order appealed from makes no finding that appellant's failure to inform the Nassau County Court of his Federal engagement was either a deliberate attempt to conceal the March 29 trial date, or a reckless disregard of his professional obligation to the Court. Such a finding could not have been made because of the fact that the Charmont trial had been estimated to last no more than two weeks by everyone involved in the non-jury case. Although the language of the District Judge's memorandum intimates that appellant's failure to reveal his certificate of engagement to the Nassau County Court Judge constituted a reckless disregard of his professional obligation, no such finding was made by the Judge and the record, we submit, would not support such a finding.

We view the Court's action below as imposing a $1,500 fine upon appellant for the disruption caused by

his error of judgment in becoming engaged in the Charmont trial without having apprised the Nassau County Court Judge of his Federal engagement. As a matter of hindsight, appellant's error can easily be established. But it is likewise true that from appellant's view such a conflict was not foreseeable in the face of the two-week estimate for the Charmont trial announced by the Judge and prosecutor.

In either event, we submit that attorneys should not suffer financial reprisal of "costs" simply because of an error of judgment which resulted in the disruption of the commencement of a trial. To those attorneys active in litigation, hardly a week goes by without the exercise of judgment as to the length or progress of a trial. Quite often estimates are wrong, or the unexpected occurs which eliminates or prolongs the duration of a trial.

Attorneys should be exceedingly careful and diligent to meet their obligation to a Court which has set a firm trial date and issued a certificate of engagement to counsel for the purpose of arming the attorney with authority to justify declining other Court engagements. But here there was ample reason for appellant to gauge that no conflict would occur on March 29 if the trial on March 8 would have concluded as expected in two weeks.

It is for these practical considerations, that we submit the standard to be met before the imposition of "costs" upon an attorney should be no less than the standard required for a "fine" to be imposed for contempt of Court. Trial Judges have traditionally sought to invoke the provision of contempt under 18 U.S.C. § 401 and Rule 42 of the Federal Rules of Criminal Procedure for the purpose of imposing sanctions upon attorneys whose conduct

is alleged to have caused disruption of the Court's business. See e.g.: *Sykes* v. *United States, supra; In Re Farguhar*, 492 F.2d 561 (D.C. Cir. 1973); *Matter of Dellinger*, 461 F.2d 389 (7th Cir. 1972); *In re Walker*, 275 App. Div. 688 (2d Dept. 1949), 86 N.Y.S. 2d 726. Before imposing the sanction of contempt under 18 U.S.C. § 401, the Court must find that the attorney, had acted out of a "willful" disregard or disobedience of the Court's authority.

Although the District Judge did not cite the authority under which the Court exercised its power of sanction, it is apparent that the Judge relied upon Rule 8 of the Individual Assignment and Calendar Rules for the Eastern District of New York. We read Rule 8 as we read the contempt statute, 18 U.S.C. § 401. Both are designed to impose punishment for conduct considered detrimental to the administration of the Court's business. Rule 8 is entitled "Sanctions" and authorizes the imposition of "reasonable costs directly against counsel whose action has obstructed the effective administration of the court's business". The same essential elements appear in Rule 8 as in 18 U.S.C. § 401 (1, 3).

We can see no justification for a Court to punish an attorney for conduct considered detrimental to the administration of the Court's business without a finding that it was the product of wrongful intent by the attorney. To hold otherwise would mean that an attorney can be disciplined by financial reprisal for conduct attributable to mistake, inadvertance or error of judgment. This ominous result is wholly undesirable to the administration of the Court's business. It creates an apprehensive atmosphere among members of the Bar that can only deter experienced and able trial lawyers from accepting engagements in the Federal Courts. Trial schedules are subject

to a variety of circumstances which can place a lawyer in a conflict situation without much difficulty. We hold no brief for the lawyer who deliberately or recklessly disregards his professional obligation to the Court. But we perceive the honest, conscientious practitioner suffering financial reprisal under Rule 8 simply because of a mistake or error of judgment. We seek to prevent such action under Rule 8.

The effective administration of the Court's business requires the cooperation of Federal Judges, State Judges and members of the Bar. Here the record shows a sincere effort on the part of both defense counsel and the Government to avoid a major disruption of the Court's trial calendar caused by appellant's conduct. Appellant contributed to this effort by his notification to the prosecution attorneys and the Court of the impending conflict of engagements, albeit from an attempt to extricate himself out of his own difficulty.

The record also reveals a conscientious but angry District Judge who became personally offended and embroiled over the apparent delay caused by appellant's acceptance of the Nassau County engagement without revealing his Federal certificate of engagement. However justified, the District Judge's reaction did not serve to counter the apparent delay. It is evident from the record that the District Judge was primarily intent on punishing respondent rather than rectifying the situation for trial. The Judge rejected all attempts to accomplish formal substitution of counsel for appellant, as well as reasonable requests for a one week adjournment that was acceptable to the Government. The Judge even challengd counsel to seek a writ of mandamus from the Court of Appeals.* The success of the mandamus proceeding only made the District Judge angrier. Quite obviously, these

reactions undermined the Judge's ability to render purely objective judgment.

Under all of the foregoing circumstances, we respectfully submit that the record did not warrant the imposition of $1,500 as "costs" for appellant's conduct, nor does the interest of the effective administration of justice served by financial reprisals against an attorney without any evidence or finding that the attorney's conduct is the product of a deliberate or reckless disregard of his obligation to the Court, or that he had intended any disrespect for the Court.

## CONCLUSION

**The order imposing "costs" should be reversed.**

Respectfully Submitted,

July 14, 1976

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* As the Judge recognized in his memorandum decision. the Court's challenge only diverted counsel from the opportunity to promptly prepare for the trial (151a).

# United States Court of Appeals
## FOR THE SECOND CIRCUIT

No. 76-1194

UNITED STATES OF AMERICA
Plaintiff-Appellee

v.

PHILIP ROSTELLI, etal
Defendants

JOHN JOSEPH SUTTER
Defendant-Appellant

**AFFIDAVIT OF SERVICE BY MAIL**

Albert Sensale, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 914 Brooklyn Ave Brooklyn, N.Y.

That on the 14th day of July, 1976, deponent served the within Brief of Amicus Curiae, Nassau County Bar Association upon John J. Sutter, 33 Willis Ave, Mineola, N.Y. 11501

James A. Miner, 370 E. Old Country Road, Mineola, N.Y. 11501

U.S. Attorney, Eastern District of New York, 225 Cadman Plaza, Brooklyn, N.Y. 11201

Attorney(s) for the Appellee ~~Appellant~~ in the action, the address designated by said attorney(s) for the purpose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in a post office official depository under the exclusive care and custody of the United States Post Office department within the State of New York.

Albert Sensale

Sworn to before me,

This 14th day of July 1976

Shirley Amaker

SHIRLEY AMAKER
Notary Public, State of New York
No. 24 - 4502766
Qualified in Kings County
Commission Expires March 30, 1977